APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JULY 21, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-50685

CLEANCOALITION; ROBERTSON COUNTY: OUR LAND OUR LIVES

Plaintiffs-Appellants

v.

TXU POWER, doing business as TXU GENERATION COMPANY LP; OAK GROVE MANAGEMENT COMPANY LLC; TXU CORPORATION

Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas

Before REAVLEY, SMITH, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

This case of first impression involves the scope of citizen-suit jurisdiction under the Clean Air Act ("CAA"). *See* 42 U.S.C. § 7604(a). Plaintiffs-Appellants filed suit to enjoin Defendants-Appellees from constructing a

pulverized coal-fired power plant in their community, alleging various violations of the CAA preconstruction permit process. The district court dismissed this case on the ground that, *inter alia*, neither of the asserted bases for subject matter jurisdiction, §§ 7604(a)(1) and 7604(a)(3), provides for jurisdiction in this case. For the reasons stated herein, we agree and, therefore, affirm the judgment of the district court.

I. BACKGROUND FACTS

CleanCOALition and Robertson County: Our Land, Our Lives (collectively "Appellants") are environmental interest groups whose members are concerned with environmental health issues, including air quality. TXU Power, Oak Grove Management LLC, and TXU Corporation (collectively "TXU") are utility entities that have proposed the construction of a pulverized coal-fired power plant in Robertson County, Texas. Members of Appellants reside in Robertson County and allege they will be adversely affected by emissions from the plant.

On July 27, 2005, TXU applied for a preconstruction permit with the Texas Commission on Environmental Quality ("TCEQ"), which regulates the preconstruction authorization process for the State of Texas under the CAA's Prevention of Significant Deterioration ("PSD") Program. *See* 42 U.S.C. § 7401, *et seq.* On February 21, 2006, the TCEQ completed a technical review of TXU's application and issued a preliminary decision and draft permit. TXU requested the TCEQ to refer the application to the State Administrative Office of

Hearings ("SOAH") for a hearing to determine whether it complied with all relevant statutory and regulatory requirements. One of the Appellants participated in this hearing. On August 23, 2006, the SOAH issued a Proposal for Decision approving the permit, subject to final review by the TCEQ.

On December 1, 2006, after expiration of a 60-day written notice,[1] Appellants filed suit against TXU alleging that its permit application does not comply with requirements of the PSD Program. Specifically, Appellants allege that (1) TXU is violating preconstruction emissions standards and limitations mandated by the CAA; and (2) TXU intends to construct its proposed plant without a CAA-compliant permit. Appellants seek, *inter alia*, (1) declaratory relief that TXU is in violation of the CAA; (2) temporary and permanent injunctive relief prohibiting the construction of the plant; and (3) an order that TXU comply with the preconstruction requirements of the PSD Program. They also seek an assessment of civil penalties against TXU in the amount of $27,500.00 per day for each violation.

On December 21, 2006, TXU filed a motion to dismiss based on jurisdictional, justiciability, and abstention grounds. On May 21, 2007, the district court granted the

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1. Prior to filing certain citizen suits, the CAA requires that aggrieved parties give 60 days notice of the standard, limitation, or order alleged to be violated to (1) the EPA, (2) the state in which the alleged violation occurred, and (3) the alleged violator. *See* 42 U.S.C. § 7604(b). Here, Appellants sent the requisite notice.

motion to dismiss. Specifically, the district court held that (1) Section 7604(a)(1) does not authorize citizen suits to redress alleged pre-permit, preconstruction, pre-operation CAA violations; (2) Section 7604(a)(3) of the CAA does not authorize preconstruction citizen suits against entities that either have obtained a permit or are in the process of doing so; (3) Appellants failed to present a live case or controversy because the state permit process is still ongoing; and (4) even if it had subject matter jurisdiction, the district court would abstain from exercising it pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) because timely and adequate state court review was available and the exercise of federal review would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern. Appellants filed a timely notice of appeal.[2]

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2. Subsequent to the filing of this appeal, on June 13, 2007, the TCEQ voted to grant the permit and on June 20, 2007, issued an order to that effect. On August 8, 2007, the TCEQ overruled a motion for rehearing. Separate entities—other than the parties in this case—have since filed suit in state court challenging the issuance of the permit. TXU has filed an unopposed motion for this court to take judicial notice of these facts. A court may take judicial notice of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). "An appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court." *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir.2001) (citing Fed.R.Evid. 201(f)). We agree that these facts are the kind of which this court could take judicial notice, though they do not alter our disposition in this case.

Appendix A

II. STATUTORY AND REGULATORY FRAMEWORK

Congress enacted the 1970 Amendments to the CAA to establish "a comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *GM Corp. v. United States*, 496 U.S. 530, 532, 110 S.Ct. 2528, 110 L.Ed.2d 480 (1990). The 1970 Amendments indicate, however, that although "[f]ederal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution," *see* 42 U.S.C. § 7401(a)(4), "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." *See* 42 U.S.C. § 7401(a)(3). Thus, while the Amendments assign the Environmental Protection Agency ("EPA") the responsibility for "prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard" for certain pollutants, *see* 42 U.S.C. § 7409(1)(A), they assign the States the primary responsibility for "assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards ['NAAQS'] will be achieved and maintained within each air quality control region in such State." *See* 42 U.S.C. § 7407(a); *see also* 42 U.S.C. § 7410(a)(1) ("Each State shall . . .

adopt . . . a plan which provides for implementation, maintenance, and enforcement of such primary . . . [and] secondary standard in each air quality control region (or portion thereof) within such State."). They further mandate that each State implementation plan ("SIP") include a permit program. *See* 42 U.S.C. § 7410(a)(2)(C). In Texas, the TCEQ administers the State CAA permit program.[3]

In 1977, further amendments were made to the CAA in which Congress enacted the PSD Program, *see* 42 U.S.C. §§ 7470-7492, because the then-existing EPA New Source Performance Standards did too little to "achiev[e] the ambitious goals of the 1970 Amendments." *Envtl. Def. v. Duke Energy Corp.*, 127 S.Ct. 1423, 1429 (2007) (citation omitted). Thus, the 1977 Amendments "[gave] added protection to air quality in certain parts of the country 'notwithstanding attainment and maintenance of' the NAAQS." *Id.* at 1427 (quoting

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3. Although, the EPA is required to approve SIPs that provide for the timely attainment and subsequent maintenance of primary and secondary ambient air standards as well as satisfy other CAA general requirements, *see* 42 U.S.C. § 7410(a)(3), the EPA has no authority to question the wisdom of a State's choices of emission limitations if they are part of a SIP that otherwise satisfies the standards set forth in 42 U.S.C. § 7410(a)(2). "Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. NRDC*, 421 U.S. 60, 79, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 268-69, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976).

42 U.S.C. § 7470(1)). They also "assure[d] that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." 42 U.S.C. § 7470(5). To ensure CAA compliance, Congress mandated the issuance of PSD permits before construction of any "major emitting facility." *See* 42 U.S.C. § 7475(a)(1).

Under the 1977 Amendments—similar to the 1970 Amendments—"[s]tates have the primary role in administering and enforcing the various components of the PSD program." *ADEC v. EPA*, 540 U.S. 461, 491 (2004) (quoting 57 Fed.Reg. 28,095 (1992)). However, Congress has set forth explicit substantive and procedural requirements that must be met prior to the construction of any major emitting facility. The substantive requirements include, *inter alia*, a demonstration that: (1) "emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any" applicable emission standards; (2) "the proposed facility is subject to the best available control technology for each pollutant;" (3) the facility complies with any applicable Class I area protection requirements; (4) "there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;" and (5) "the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit

is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source." *See* 42 U.S.C. §§ 7475(a)(3)-(7), 7475(d). The procedural requirements include, *inter alia*, a public hearing and an opportunity for any interested person to appear and submit comments on a proposed permit. *See* 42 U.S.C. § 7475(a)(2). The EPA further "interprets existing law and regulations to require an opportunity for state judicial review of PSD permit actions under approved PSD SIPs by permit applicants and affected members of the public in order to ensure an adequate and meaningful opportunity for public review and comment on all issues within the scope of the permitting decision, including environmental justice concerns and alternatives to the proposed source." Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—Prevention of Significant Deterioration Program, 61 Fed.Reg. 1880 (Jan. 24, 1996) (to be codified at 40 C.F.R. pt. 52) (The EPA).

The State of Texas has an EPA-approved PSD Program. *See* Approval and Promulgation of Implementation Plans; Texas; Revisions to Regulations for Control of Air Pollution by Permits for New Sources and Modifications, 67 Fed.Reg. 58,697 (Sept. 18, 2002) (to be codified at 40 C.F.R. pt. 52). Pursuant to this Program, "[b]efore work is begun on the construction of a new facility or a modification of an existing facility that may emit air contaminants, the person planning

the construction or modification must obtain a permit or permit amendment from the commission." Tex. Health & Safety Code § 382.0518(a). The general requirements for a permit are set forth in Title 30 of the Texas Administrative Code, Sections 116.111 and 116.160-63. In reviewing a PSD permit application, Texas law provides an opportunity for public comment. *See* 30 Tex. Admin. Code § 55.150, *et seq.* Texas law also permits any person granted party status to request and participate in contested hearings before the SOAH. *See* 30 Tex. Admin. Code § 55.200, *et seq.* Finally, Texas law allows for state judicial review over any permit decision. *See* Tex. Gov't Code § 2001.001, *et seq.*

III. ANALYSIS

The district court dismissed CleanCOALition's complaint in this case for lack of subject matter jurisdiction, a decision of a legal question we review *de novo*. *Meredith v. La. Fed'n of Teachers*, 209 F.3d 398, 402 (5th Cir.2000). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir.1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir.1996)).

The jurisdictional question in this case involves construction of the CAA's citizen-suit provisions. "[T]he starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt.*

Hood Stages, Inc., 437 U.S. 322, 330, 98 S.Ct. 2370, 57 L.Ed.2d 239 (1978); *see also Sutton v. United States*, 819 F.2d 1289, 1292 (5th Cir.1987) ("We begin, as we must, with an analysis of the text of the statute itself."). "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Birdwell v. Skeen*, 983 F.2d 1332, 1339 (5th Cir.1993) ("Where the language of a statute is clear and unambiguous, courts should not undertake to add to or detract from its provisions."). "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988)); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[A] statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context.").

We now turn to the statutory text in question. The CAA provides for federal citizen suit jurisdiction in three circumstances:

(1) Against any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation;

(2) Against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator, or

(3) Against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of title I (relating to significant deterioration of air quality) or part D of title I (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

42 U.S.C. §§ 7604(a)(1)-(3).[4] Only the first and third provisions are at issue in this case. We address each provision in turn.

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4. These provisions "provide citizen participation in the enforcement of standards and regulations established under [the CAA]." *Natural Res. Def. Council v. Train*, 510 F.2d 692, 699 (D.C.Cir.1975) (citations omitted). They reflect Congress's recognition that "citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike." *Id.* at 699-700 (citations omitted).

A. Whether § 7604(a)(1) authorizes citizen suits to redress alleged pre-permit, preconstruction, pre-operation CAA violations?

The district court held that § 7604(a)(1) does not authorize citizen suits to redress alleged pre-permit, preconstruction, pre-operation CAA violations. According to the district court, when a facility is still in the pre-permit, preconstruction, pre-operation stage, it has yet to emit anything and cannot be deemed "to have violated . . . or be in violation of an emission standard or limitation." *See* 42 U.S.C. § 7604(a)(1); *see also Weiler v. Catham Forest Prods., Inc.*, 392 F.3d 532, 538 (2d Cir.2004) ("[A § 7604(a)(1)] suit can only be brought against a private defendant after a facility has been built and begun operation."); *Sugarloaf Citizens Ass'n v. Montgomery County*, No. 93-2475, 1994 WL 447442 at *8 n. 9 (4th Cir. Aug. 17, 1994) (unpublished) ("[U]ntil construction is completed . . . [Appellees] can neither begin emissions nor violate any emissions standard."). Appellants, citing §§ 7604(f)(3) and 7604(f)(4),[5] respond that the phrase "emission standard

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5. Section 7604(f) broadly defines an "emission standard or limitation under this Act" as follows:

> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard;
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> (2) a control or prohibition respecting a motor vehicle fuel or fuel additive;

(Cont'd)

or limitation" is defined broadly enough to encompass preconstruction requirements and thus, TXU can be deemed "to have violated . . . or be in violation of an emission standard or limitation" simply by filing a permit application without satisfying those requirements. We address §§ 7604(f)(3) and § 7604(f)(4) in turn.

(Cont'd)

> (3) any condition or requirement of a permit under part C of title I (relating to significant deterioration of air quality) [and other particular types of permits not applicable here], any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, [fuel, fuel additives, visibility protection, ozone protection, or stationary sources]; or
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> (4) any other standard, limitation, or schedule established under any permit issued pursuant to title V or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations;
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> which is in effect under this Act (including a requirement applicable by reason of section 118 or under an applicable implementation plan.)

42 U.S.C. § 7604(f).

1. **Whether the definition of "emission standard or limitation," as set forth in § 7604(f)(3), is broad enough to include requirements for filing preconstruction permit applications?**

Appellants first argue that because "emission standard or limitation" is defined to include "any condition or requirement of a permit under part C of title I (relating to significant deterioration of air quality)," *see* 42 U.S.C. § 7604(f)(3), which contains preconstruction requirements, TXU can be deemed "to have violated . . . or be in violation of an emission standard or limitation" simply by filing a permit application without satisfying those requirements. We disagree. One can hardly be deemed to have violated a "condition or requirement of a permit" simply by filing an incomplete permit *application*, in response to which a permit may or may not issue. *See Miss. River Revival, Inc. v. EPA*, 107 F.Supp.2d 1008, 1015 (D.Minn.2000) (construing Clean Water Act citizen suit provision, which was modeled after the CAA, and finding that it "does not authorize jurisdiction for an action challenging the contents of a permit application."); *Freeman v. Cincinnati Gas & Elec. Co.*, No. 1:05CV179, 2005 WL 2837466, at *2 (S.D.Ohio Oct. 27, 2005) (holding that a proposed Title V air permit cannot form the basis of a citizen suit). Nevertheless, Appellants invite us to interpret the phrase "any condition or requirement of a permit" to mean "any condition or requirement *to obtain* a permit." We decline to do so. Instead, we interpret the phrase "of a permit" as doing nothing more than broadening the definition of "emission standard or

limitation" to include those conditions and requirements found in any permit issued pursuant to any of the various provisions listed in § 7604(f)(3).[6] Until the permit issues, however, no "permit" exists to be violated. If Congress wanted to define "emission standard or limitation" to include any condition or requirement to obtain a preconstruction permit, it certainly knew how to do so. Indeed, the last clause of another section, § 7604(f)(4), specifically defines "emission standard or limitation" to include "any requirement to obtain a permit *as a condition to operations.*"[7] No similar counterpart exists for a *preconstruction* permit, which is at issue in this case and treated separately under the CAA. *Compare* 42 U.S.C. § 7475 (preconstruction permits) *with* 42 U.S.C. § 7661, *et seq.* (operation permits). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate

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6. The legislative history supports our interpretation. Indeed, according to the Joint Explanatory Statement of the Committee of Conference, §§ 7604(a)(3) and 7604(f)(3) permit citizens suits to redress "the violation of any condition or requirement specified by the State or the Administrator under a significant deterioration or non-attainment permit. . . ." *See* H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502, 1554.

7. Although Appellants argued before the district court that this clause provides an alternative basis for jurisdiction, they have since abandoned that argument, most likely because it applies to operation permits and here, Appellants are challenging TXU's application for a preconstruction permit.

inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, we presume that by not including similar language for preconstruction permits, Congress did not intend, by virtue of § 7604(f)(3), to define "emission standard or limitation" to include conditions or requirements to obtain such permits.

2. Whether the definition of "emission standard or limitation," as set forth in § 7604(f)(4), is broad enough to include requirements for filing preconstruction permit applications?

The first clause of § 7604(f)(4) presents a much more difficult question. Appellants argue that because that clause defines "emission standard or limitation" to include "any other standard, limitation, or schedule established . . . under any applicable State implementation plan," *see* 42 U.S.C. § 7604(f), and such plans also contain preconstruction requirements, TXU can be deemed "to have violated . . . or be in violation of an emission standard or limitation" simply by filing a permit application without satisfying those requirements. The district court, noting that Appellants are challenging TXU's application for a preconstruction permit, rejected this argument on the ground that § 7604(f)(4) is limited, in its entirety, to operating permits. We disagree. It is true that § 7604(f)(4) was added as part of Title V of the CAA's operating permit program, *see* CAA Amendments, Pub.L. No. 101-549, Title III, § 302(f), Title VII, § 707(a)-(g), 104 Stat. 2574, 2682 (1990), and that certain clauses of that section are

expressly limited to operating permits.[8] However, the first clause is not so limited and broadly defines "emission standard and limitation" to include "any other standard, limitation, or schedule established . . . under any applicable State implementation plan." *Id.* The CAA further defines "applicable implementation plan" to include plans involving both preconstruction and operating permits. *See* 42 U.S.C. § 7602(q).[9] Thus, the district court erred in concluding that § 7604(f)(4), in its entirety, is limited to operating permits. *See Conservation Law Found., Inc. v. Romney*, 421 F.Supp.2d 344, 350 n. 6 (D.Mass.2006); *Cmtys. for a Better Env't v. Cenco Ref. Co.*, 180 F.Supp.2d 1062, 1082 (C.D.Cal.2001).

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8. For example, § 7604(f)(4) broadens the definition of "emission standard or limitation" to include "any other standard, limitation, or schedule established under any permit issued pursuant to title V" and "any permit term or condition, and any requirement to obtain a permit as a condition of operations." *See* 42 U.S.C. § 7604(f)(4).

9. That section provides:

> For purposes of this Act, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 110 [involving preconstruction permit programs], or promulgated under section 110(c), or promulgated or approved pursuant to regulations promulgated under section 301(d) [involving operating permit programs] and which implements the relevant requirements of this Act.

42 U.S.C. § 7602(q).

TXU argues that the first clause of § 7604(f)(4) is inapplicable for a different reason. According to it, the terms "standards" and "limitations" in that clause refer only to "emission standards" and "emission limitations," which are further defined in the CAA to mean "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis[.]" *See* 42 U.S.C. § 7602(k). Thus, under its interpretation, because permit application requirements do not limit "the quantity, rate, or concentration of emissions of air pollutants on a continuous basis," they are not "emission standards" or "emission limitations" and, concomitantly, TXU cannot be deemed to have violated or be in violation of such standards and limitations simply by filing an alleged incomplete permit application. We disagree with TXU's basic premise that the terms "standards" and "limitations" in the first clause of § 7604(f)(4) refer only to "emission standards" and "emission limitations." Indeed, the plain text of that clause defines "emissions standards and limitations" to mean "any *other* standard, limitation, or schedule established . . . under any applicable State implementation plan." 42 U.S.C. § 7604(f)(4) (emphasis added). The use of the term "other" indicates that Congress intended those terms to mean something more than just "emission standards" and "emission limitations." We decline to import the word "emission" into a clause that does not expressly include it. *See Cmtys. for a Better Env't*, 180 F.Supp.2d at 1081; *see also Conservation Law Foundation v. FHA*, 24 F.3d 1465, 1477 n. 5 (1st Cir.1994)

("Defendants' use of the definition for 'emissions standard or limitation' provided in 42 U.S.C. § 7602(k) (a requirement 'established by the State or Administrator') is improper because § 7604(f) defines this term for all of § 7604, trumping the definition in § 7602(k).").[10]

Although we reject the district court and TXU's interpretations of § 7604(f)(4), we need not decide today whether the definition of "emission standard or limitation" is broad enough, by virtue of § 7604(f)(4), to encompass preconstruction requirements because even if that phrase is so defined, we fail to see how TXU could be held to violate those requirements simply by filing an incomplete permit application, in response to which a permit may or may not issue, especially when the permit process is still pending and subject to state judicial review. *See Miss. River Revival*, 107 F.Supp.2d at 1015; *Freeman*, 2005 WL 2837466, at *2. Indeed, the preconstruction requirements set forth in the Texas SIP, such as evidence that the facility will utilize the best available control technology, are preconditions for

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10. Moreover, TXU's interpretation would render superfluous another section, § 7604(f)(1), which already defines the phrase "emission standard or limitation" to include an "emission standard" or "emission limitation." *See* 42 U.S.C. § 7604(f)(1). "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotations and citation omitted); *see also Hoffman v. Kramer*, 362 F.3d 308, 318 n.7 (5th Cir.2004).

granting a preconstruction permit, not preconditions for *filing* a preconstruction permit application. *See* 30 Tex. Admin. Code § 116.111(a). Presumably, an entity can file as many incomplete permit applications as it so chooses, but that does not mean in doing so, it is violating a preconstruction requirement or an emission standard or limitation. Moreover, the Eleventh Circuit has held, following a long line of district court cases, that "violations of the preconstruction permitting requirements occur at the time of construction." *Nat'l Parks & Conservation Ass'n v. TVA*, 502 F.3d 1316, 1322 (11th Cir.2007) (collecting cases and quoting *New York v. Niagara Mohawk Power Corp.*, 263 F.Supp.2d 650, 661 (W.D.N.Y.2003)). Here, the facility at issue has not yet begun construction and no permit has been issued. In short, we agree with the district court's ultimate conclusion that under the plain language of § 7604(a)(1), TXU's mere filing of an alleged incomplete permit application does not constitute a violation of an emission standard or limitation under the CAA and, concomitantly, that subject matter jurisdiction is lacking in this case.[11]

To the extent that Appellants argue that jurisdiction under § 7604(a)(1) is implied in this case, "[i]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Middlesex County Sewerage Auth. v. Nat'l Sea*

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11. Whether § 7604(a)(1) redresses alleged preconstruction violations against either TXU or the TCEQ once the permit issues and/or construction of the facility commences are issues we need not decide today.

Clammers Assn., 453 U.S. 1, 14-15 (1981). As the Supreme Court has explained, where Congress has provided "elaborate enforcement provisions" for remedying the violation of a federal statute—as Congress has done with the CAA—"it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under [the statute]." *Id.* at 14, 101 S.Ct. 2615 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)). Here, Congress and the EPA have set forth an elaborate enforcement scheme through which citizens have an opportunity to participate in public hearings and state court proceedings involving the issuance of any construction permit. *See* 42 U.S.C. § 7475(a)(2); *see also* Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—Prevention of Significant Deterioration Program, 61 Fed.Reg. 1880 (Jan. 24, 1996) (to be codified at 40 C.F.R. pt. 52). It would seem odd then that Congress would simultaneously authorize citizens to bypass this process altogether and seek simultaneous review in federal court.[12]

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12. Appellants, citing Title V of the CAA, argue that such dual enforcement is common. Although Title V of the CAA provides for federal judicial review to evaluate the validity of an operating permit, *see* 42 U.S.C. § 7661d(b)(2), it only does so *after* the issuance of the permit and the subsequent denial of the aggrieved party's administrative petition for review. Thus, contrary to Appellants' interpretation, Title V does not provide for simultaneous federal review while the state operating permit process is still ongoing.

B. Whether § 7604(a)(3) authorizes preconstruction citizen suits against facilities that either have obtained a permit or are in the process of doing so?

The district court held that § 7604(a)(3) does not authorize preconstruction citizen suits against facilities that have either obtained a permit or are in the process of doing so. Instead, the district court interpreted that section as authorizing citizen suits when an entity proposes to construct or constructs a facility without a permit whatsoever. We agree with the district court's interpretation. Appellants interpret the phrase "without a permit" to mean "without a permit that complies with the CAA."[13] However, we decline to rewrite the plain

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13. Appellants cite legislative history to support their interpretation. According to the Senate amendment, "Section [7604] . . . is amended to allow a citizen to bring suit to prevent construction of a major emitting facility *without a permit in compliance with* [various sections of the CAA]." *See* H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502, 1553 (emphasis added). Appellants interpret the phrase "without a permit in compliance with the CAA" to mean "without a permit that complies with the CAA." Thus, according to Appellants, a facility can be deemed to have violated § 7604(a)(3) simply by filing a permit application that fails to comply with the CAA. However, whether the use of word "compliance" in the Senate amendment necessarily means that Congress intended to authorize citizen suits to second-guess state agency permit determinations while those determinations are still pending is far from clear. Moreover, the subsequent House Conference Report, which concurs in the Senate amendment, omits the phrase "in compliance with" altogether and simply states that § 7604(a)(3) is amended so that "citizens suits are

(Cont'd)

language of the statute. Here, not only has TXU applied for a permit, it has since successfully obtained one, though still subject to state judicial review. Thus, it can hardly be said—as Appellants must in order for § 7604(a)(3) to apply—that TXU is proposing to construct or constructing a facility "without a permit." *See Ogden Projects v. New Morgan Landfill Co.*, 911 F.Supp. 863, 867-68 (E.D.Pa.1996) (indicating that § 7604(a)(3) authorizes citizen suits when facility is proposing to construct plant without a permit at all); *see also Heisen v. Pacific Coast Bldg. Prods., Inc.*, No. 93-16213, 1994 WL 250029, *1 (9th Cir. Jun. 9, 1994) (unpublished) (rejecting attempt to utilize § 7604(a)(3) to collaterally attack issuance of permit by alleging that facility submitted fraudulent information to obtain it). In short, we agree with the district court that § 7604(a)(3) does not authorize preconstruction citizen suits against facilities that have either obtained a permit or are in the process of doing so.

(Cont'd)

authorized against sources to enforce compliance only with respect to . . . any proposal to construct or the construction of any new or modified major emitting facility *without a permit* under the prevention of significant deterioration provision or the nonattainment provisions." *See* H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502, 1554 (emphasis added). Thus, the legislative history is less than determinative and far from helpful.

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.[14]

AFFIRMED.

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14. Because we find the district court lacks subject matter jurisdiction in this case, we do not address the remaining justiciability and abstention issues reached by that court.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION DATED AND FILED MAY 21, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. W-06-CA-355

CLEANCOALITION AND ROBERTSON COUNTY: OUR LAND, OUR LIVES,

Plaintiffs,

v.

TXU POWER, A D/B/A OF TXU GENERATION COMPANY LP, OAK GROVE MANAGEMENT COMPANY LP, AND TXU CORPORATION,

Defendants.

ORDER

Before the Court is Defendants Oak Grove Management Company LLC, TXU Power, a D/B/A of TXU Generation Company LP, And TXU Corp.'s Motion To Dismiss. The Court held a hearing on this Motion on March 23, 2007. Having heard the arguments of the parties and reviewed the Motion, Response, Reply, pleadings, and applicable legal authority, the Court finds that the Motion has merit and should be granted.

Appendix B

I. BACKGROUND

The project at issue in this case is proposed by Oak Grove Management LLC ("Oak Grove") and consists of the construction and development of a 1,720 MW power generating facility in Robertson County ("the Project"). The proposed facility will be fueled by Texas-mined lignite. The Project will help fulfill a demand for generation of power in Texas, and will result in approximately 1,800 on-site construction jobs, permanent employment of almost 2,000 persons, and approximately $800 million in spending.

In order to construct the Project, on July 27, 2005, Oak Grove applied to the Texas Commission on Environmental Quality ("TCEQ") for an air permit, which includes a preconstruction authorization under the Prevention of Significant Deterioration ("PSD") Program of the federal Clean Air Act ("CAA").[1] Oak Grove subsequently updated its application, and on February 21, 2006, the TCEQ completed a technical review of the application and issued a preliminary decision and draft permit.

Oak Grove then requested that the TCEQ refer the permit application to the State Administrative Office of Hearings ("SOAH") for a hearing to determine whether it complied with statutory and regulatory requirements. Plaintiff Robertson County: Our Land, Our Lives ("RCOLOL") participated as a party in the hearing before SOAH. A Proposal for Decision was issued by

1. *See* Plaintiff's Complaint, ¶¶ 13, 25.

SOAH on August 23, 2006. This decision is currently being reviewed by the TCEQ to determine whether the permit should issue.

On December 1, 2006, Plaintiffs CleanCoalition and RCOLOL filed a citizen suit pursuant to the federal CAA against Defendants TXU Power, a d/b/a of TXU Generation Company, LP, Oak Grove Management Company, LLC, and TXU Corporation (collectively "Defendants") regarding the Project. Defendants have now filed a Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

II. LEGAL AUTHORITY

A. Standard of Review

Rule 12(b)(1) demands dismissal if the court lacks jurisdiction over the subject matter of the plaintiff's claims. Fed. R. Civ. P. 12(b)(1); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). The burden of proof in a Rule 12(b)(1) motion to dismiss rests with the party asserting jurisdiction. *See Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). "'A case is

properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case.'" *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996)). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Ramming*, 281 F.3d at 161. This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. *Id.*

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 598 (1969). It is well settled that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Boudeloche v. Grow Chemical Coatings Corps.*, 728 F.2d 759, 762 (5th Cir. 1984); *Kaiser*, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts well pleaded in the complaint should be accepted as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986). "The question therefore is whether in the light most favorable to Plaintiff and with every doubt resolved in his behalf, the complaint states any valid

claim for relief." 5 Wright and Miller, *Federal Practice and Procedure*, Section 1357 at 601.

B. Statutory and Regulatory Background

Congress established in the CAA "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The Act makes clear, however, that "air pollution prevention . . . and air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added); *see also id.* § 7407(a). Thus, while the CAA assigns EPA the responsibility for establishing national ambient air quality standards ("NAAQS") *(i.e.*, the standards for the air we breathe) for certain pollutants, *see* 42 U.S.C. § 7409, the Act assigns the States the responsibility for ensuring compliance with them through "State Implementation Plans" or "SIPs." *See id.* §§ 7407(a), 7410(a).

The SIPs are comprised of State regulations that, among other things, set emission limitations for sources in the State so as to meet and maintain the NAAQS. SIPs include permitting programs such as the PSD program cited in the Complaint. EPA must approve the SIP for it to become effective under the federal CAA (and such EPA approval is subject to judicial review in the U.S. Court of Appeals, *see* 42 U.S.C. § 7607(b)(1)). But EPA has no authority to second-guess the State's choice of emission limitations, so long as the SIP

achieves its ultimate purpose of attaining and maintaining the NAAQS. *See Train v. NRDC*, 421 U.S. 60, 79 (1975); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976).

In 1977, Congress enacted the PSD program at issue in this case. 42 U.S.C. §§ 7470-7492. Like the NAAQS program, PSD is implemented and enforced primarily by the States through their SIPs. *See, e.g., Alaska Dep't Envt'l Conserv. v. EPA*, 540 U.S. 461, 491 (2004) *(ADEC)* (citing 57 Fed. Reg. 28,095 (1992) ("[S]tates have the primary role of administering and enforcing the various components of the PSD program.")) The PSD program is a comprehensive permitting scheme for "major emitting facilities" in areas of the country that are designated having attained the NAAQS (or are "unclassifiable" with respect to the NAAQS). Thus, the cornerstone requirement of the PSD program is that a new source (of a type and size subject to PSD) must obtain a PSD permit before "construction is commenced." 42 U.S.C. § 7475(a)(1). Once the State's PSD program is approved as a part of the SIP, it is the State permitting authority, not EPA, that issues a PSD permit for new facilities in that State.

Congress set both substantive and procedural requirements that PSD permits must meet. The substantive requirements include: (i) a demonstration that the emissions from the new source will not adversely affect air quality, *id.* §§ 7473, 7475(a)(3); (ii) installation of the "best available control technology," or "BACT," which is determined on a case-by-case basis by the State

permitting agency, exercising its judgment on technical issues and taking into account energy, environmental, and economic impacts and other costs, *id.* §§ 7475(a)(4), 7479(3), *see ADEC*, 540 U.S. at 472-73, 494; (iii) satisfaction of any applicable "Class I" area protection requirements, 42 U.S.C. § 7475(a)(5); (iv) analysis of any secondary air quality impacts, *id.* § 7475(a)(6); and (v) monitoring requirements, *id.* § 7475(a)(7).

Congress also required elaborate procedural safeguards for States to issue permits, including a public hearing and an opportunity for any interested person to appear and submit comments on a proposed permit. *Id.* § 7475(a)(2). A State's PSD program must contain procedures that implement at least all of these statutory requirements—substantive and procedural—to be "approvable" as part of a SIP. Furthermore, EPA has interpreted the Act to require adequate procedures for judicial review in State court of PSD permits issued by a State before EPA will approve a PSD program into the SIP. 61 Fed. Reg. 1,880, 1,882 (1996); *see ADEC*, 540 U.S. at 508 (Kennedy, J., dissenting).

The State of Texas has a SIP-approved PSD program that EPA found complies with all of the procedural and substantive requirements of the statute, and that program is administered by the TCEQ. *See* 67 Fed. Reg. 58,697-58,711 (2002). Under this approved program, before construction can begin on proposed new facilities that may emit air contaminants, the person planning the construction must obtain a preconstruction permit from the TCEQ. Tex. Health & Safety Code Ann.

§ 382.0518. Preconstruction PSD permits are required for proposed "major stationary source" facilities, such as the Project, located in "attainment areas," such as Robertson County. 30 Tex. Admin. Code §§ 116.111(a)(2)(I), 116.160-63. In reviewing a PSD permit application, the TCEQ provides opportunity for public comment. 30 Tex. Admin. Code Ann. § 55.150 *et seq.* Additionally, persons may request and participate in contested case hearings before the SOAH if they are granted party status. *Id.* § 55.200 *et seq.* The Texas air permit process also provides for judicial review in state court in Travis County of the TCEQ's decision to issue a permit. Tex. Gov't Code Ann § 2001.001 *et seq.*

C. Citizen Suits

Section 7604 is the sole source of authority for citizen suits under the federal CAA. This provision authorizes citizen suits in only three circumstances:

> (1) Against any person who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,
>
> (2) Against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which

> is not discretionary with the Administrator,[2] or
>
> (3) Against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of title I [42 USCS §§ 7470 et seq.] (relating to deterioration of air quality) or part D of title I [42 USCS §§ 7501 et seq.] (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

42 U.S.C. §§ 7604(a)(1) - (3).[3]

D. Statutory Construction

Statutory construction begins with the plain language of a statute, but "plain" does not always mean "indisputable" or "pellucid." *Aviall Servs. v. Cooper Indus.*, 312 F.3d 677, 680 (5th Cir. Tex. 2002), *rev'd on other grounds*, 543 U.S. 157 (2004). Consequently, sound interpretation reconciles the text of a disputed provision with the structure of the law of which it is a part; may draw strength from the history of enactment of the provision; and acknowledges the legislature's general policies so that the interpretation does not become absurd. *Id.* (citing *Crandon v. United States*, 494 U.S.

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2. 42 U.S.C. § 7604(a)(2) is not at issue in this case.

3. CAA §§ 304(a)(1) - (3).

152, 158, 110 S. Ct. 997, 1001, 108 L. Ed. 2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Perrone v. GMAC*, 232 F.3d 433, 440 (5th Cir. 2000) (stating that use of legislative history is appropriate where statutory text is "opaque," "translucent," or "ambiguous"), *cert. denied*, 532 U.S. 971 (2001); *United States v. A Female Juvenile*, 103 F.3d 14, 16-17 (5th Cir. 1996) ("Axiomatic in statutory interpretation is the principle that laws should be construed to avoid an absurd or unreasonable result."); *In re Timbers of Inwood Forest Assocs., Ltd.*, 793 F.2d 1380, 1384 (5th Cir. 1986) ("Each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed.")).

III. ARGUMENTS AND ANALYSIS

A. Standard of Review

Plaintiffs argue that because Defendants seek relief under Rules 12(b)(1) and 12(b)(6), Defendant's requested relief should be evaluated solely under Rule 12(b)(6). *See Williamson v. Tucker*, 645 F.2d 404, 415-16 (5th Cir. 1981). Plaintiffs assert that when a defendant challenges both the court's jurisdiction and the existence of a federal cause of action, the Fifth Circuit requires a court to find that jurisdiction exists and deal with the objection as a direct attack on the merits.

Appendix B

Plaintiffs argue that questions of subject matter jurisdiction and the merits are normally considered "intertwined" where a statute provides both the basis of federal subject matter jurisdiction and the cause of action. *Clark v. Tarrant County, Tex.*, 798 F.2d 736, 742 (5th Cir. 1986). Plaintiffs assert that both the subject matter jurisdiction and the causes of action are provided by 42 U.S.C. § 7604.

Defendants assert that it is not necessary to address the "merits" of Plaintiffs' case in order to rule on Defendants' Motion. Defendants argue that all facts necessary to grant Defendants' Motion are admitted in Plaintiffs' Complaint because Plaintiffs admit that an application for a permit is pending before the TCEQ, that construction has not commenced, and that no permit has yet been issued on the pending application. Even if the issue of jurisdiction were held to be intertwined with the merits, Defendants argue that the Complaint would still be subject to a facial attack under Rule 12(b)(1), and if it fails to survive that challenge, dismissal under Rule 12(b)(1) is appropriate. *See Lewis v. Knutson*, 699 F.2d 230, 237 (5th Cir. 1983).

The Fifth Circuit stated in *Lewis*:

> In the special case where the challenged basis of jurisdiction is also an element of plaintiff's federal cause of action, the proper course of action is to limit the jurisdictional inquiry to facial scrutiny, and reserve the factual scrutiny for the merits of the cause of action.

> *See Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S. Ct. 396, 70 L. Ed. 2d 212 (1982) (quoting *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939 (1945)). If the facial attack defeats jurisdiction, the case should be dismissed under Rule 12(b)(1). If the case survives the facial jurisdictional attack, a failure of the existence of the cause of action should be disposed by a Rule 12(b)(6) dismissal on the merits. *See, e.g., Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876, 886 & n. 9 (5th Cir.1982). Conversely, if the jurisdictional challenge does not implicate the merits of the cause of action, the jurisdictional basis must survive both facial and factual attacks before the district court can address the merits of the claim. *See Williamson*, 645 F.2d at 412-15 & n. 9.

699 F.2d at 237. As Defendants argue, whether or not the issue of jurisdiction is intertwined with the merits in this case, Plaintiffs' Complaint is subject to a facial attack under Rule 12(b)(1). Accordingly, the Court will limit its jurisdictional inquiry to facial scrutiny. *See Williamson*, 645 F.2d at 415.

Appendix B

B. Section 304(a)(1)

Defendants argue there is no jurisdiction under section 304(a)(1). First, Defendants argue that a project that does not exist has zero emissions; thus, it cannot be in violation of emission standards let alone have repeated violations. *See Sugarloaf Citizens Ass'n v. Montgomery County*, 33 F.3d 52 (Table), No. 93-2475, 1994 U.S. App. LEXIS 21985, at *20 n.9 (4th Cir. Aug. 17, 1994) (finding lack of citizen suit jurisdiction on grounds that defendants "have all of the permits required for the construction of this facility, and until construction is completed . . . , can neither begin emissions nor violate any emissions standard"). Second, Plaintiffs' suit is premised on a permit application. Defendants argue that a permit application itself cannot violate an "emission limitation;" thus, a citizen suit cannot be based on a permit application. *See Freeman v. Cincinnati Gas & Electric Co.*, 2005 U.S. Dist. LEXIS 42524, *6-7 (S.D. Ohio October 27, 2005) (unpublished) (holding that a proposed Title V air permit cannot form the basis of a citizen suit); *Mississippi River Revival, Inc. v. EPA*, 107 F. Supp. 2d 1008, 1015 (D. Minn. 2000) (construing the Clean Water Act citizen suit provision, which was modeled after CAA § 304(a)(1), and finding that it "does not authorize jurisdiction for an action challenging the contents of a permit application.").

Plaintiffs first respond that the only requirement under section 304(a)(1) is that they must provide 60 days notice, which they assert they provided to Defendants. Plaintiffs also assert that the Court should consider the

definition of "emission standard or limitation" in section 304(f). Plaintiffs argue that the statute defines "emission standard or limitation" to include, among other things, PSD requirements and SIP requirements. Plaintiffs argue that violations of both PSD requirements and SIP requirements will support a citizen suit under section 304(a)(1). *See New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 663 (W.D.N.Y. 2003). However, Plaintiffs also argue that the definition is much broader because Courts construe the term to mean "any type of control to reduce the amount of emissions in the air." *See NRDC v. EPA*, 489 F.2d 390, 394 n.2 (5th Cir. 1974), *rev'd on other grounds sub nom. Train v. NRDC*, 421 U.S. 60 (1975). Plaintiffs assert the broad construction stems from the definition in (f)(4): "any other standard, limitation, or schedule established under any permit issued pursuant to title V [ ] or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations." 42 U.S.C. § 7604(f)(4). Plaintiffs argue that because Congress included this language regarding requirements to obtain a permit, Congress intended that a section (a)(1) claim may be based on a violation of any pre-permit requirements imposed to obtain a permit. Thus, Plaintiffs assert that it is possible to violate an emission standard or limitation before a permit is issued. Plaintiffs allege that Defendants violated pre-permit requirements including "best available control technology" ("BACT") analysis, PSD requirements during the permit application process, SIP requirements during the permit application process,

and federal and state requirements imposed in order to "obtain a permit" prior to beginning operation.

Defendants reply that Plaintiffs have paraphrased the statutory definition of "emission standard or limitation" and eliminated key language. Defendants argue that this section does not define "emission standard or limitation" in terms of "PSD" requirements" but, rather *"any condition or requirement of a permit under"* the PSD provisions. 42 U.S.C. § 7604(f)(3) (emphasis added). Defendants assert that there is no allegation in the Complaint that they are in violation of any requirements or conditions of a PSD permit; thus, because no permit has been issued, there is no "condition or requirement of a permit" and no "emission standard or limitation" at issue under section 304(f)(3). Defendants argue that the language in section 304(f)(3) regarding SIPs applies only to transportation control measures, vehicle maintenance and inspection plans, and other topics not related to PSD or this case. Defendants argue that language in section 304(f)(4) regarding SIPs clearly applies to "any other standard, limitation, or schedule established . . . under any applicable State implementation plan," and not the SIP generally. Lastly, Defendants state that section 304(f)(4) was added in 1990 as part of the Title V *operating* permit program and is separate and apart from the PSD *construction* permit program at issue in this case; thus, it is not applicable here.

The Court finds that it lacks jurisdiction under section 304(a)(1). Section 304(a)(1) allows a citizen suit

against any person who is alleged to have violated or who is in violation of an emission standard or limitation under the Act. 42 U.S.C. § 7604(a)(1). The definition of "emission standard or limitation" in section 304(f)(4) is not applicable here because it applies to the operating permit program. Plaintiffs have excluded key terms in the definition in section 304(f)(3) to support their argument. The definition states "any condition or requirement *of a permit* under" the PSD provisions. *See* 42 U.S.C. § 7604(f)(3) (emphasis added). Because Plaintiffs do not allege any condition or requirement of an issued permit in their Complaint, there is no "emission standard or limitation" to consider under section 304(a)(1). Based on the plain language of section 304(a)(1) and 304(f)(3), because no permit has issued for the Oak Grove project and the Plant does not yet exist, it cannot be in violation of any emission standards or limitations. *See id.* §§ 7604(a)(1), (f)(3); *Sugarloaf Citizens*, 1994 U.S. App. LEXIS 21985, at *20 n.9. Thus, providing 60 days notice is not the only requirement under section 304(a)(1). There must be an alleged violation of a condition or standard of an issued permit.

Next, the Court distinguishes the *Niagara Mohawk* case. In *Niagara Mohawk*, the defendants built a facility without obtaining a permit *at all*. *See Niagara Mohawk*, 263 F. Supp. 2d at 654. Thus, the State brought a citizen suit against the defendants under section 304(a)(1) and 304(a)(3). The district court held that some of the claims were time barred but the citizen suit was proper. Specifically under section 304(a)(1), the court stated the permitting authority did not even have the opportunity

to conduct a BACT analysis because of defendants failure to follow the proper preconstruction procedures. *Id.* at 663. Thus, the Court held that it would not be proper to allow defendants to frustrate the goals of the statute by dismissing Plaintiff's claims under section 304(a)(1) because it appeared uncontroverted "that if BACT had been determined by the permitting authority and the Facilities were not in compliance, suit would be authorized under" section 304(a)(1). *Id.* In contrast, the TCEQ is still determining BACT for the Oak Grove project as the State permitting process is not yet complete for Plaintiffs' permit application.

Lastly, Defendants' permit application itself cannot violate an emission standard or limitation, which is all that Plaintiffs have alleged that Defendants have done to this point. *See Mississippi River*, 107 F. Supp. 2d at 1015; *Freeman*, 2005 U.S. Dist. LEXIS 42524 at *6-7. Congress expressly intended that the establishment of an alleged violation not involve the "reanalysis of technological or other considerations at the enforcement stage." *Citizens Ass'n v. Washington*, 535 F.2d 1318, 1322 (D.C. Cir. 1976). If Plaintiffs believe Defendants' permit application contains information that may lead to potential violations of emissions standards or limitations when the Oak Grove project is constructed, the State permitting process provides an opportunity for their comments to be heard, and the TCEQ is the proper authority to conduct a technical review of those comments.

C. Section 304(a)(3)

Defendants argue there is no jurisdiction under section 304(a)(3). First, Defendants assert that Oak Grove has never stated any intention to construct the plant without a permit—Plaintiffs even admit that Oak Grove has submitted an application for a PSD permit, and, at this time, the permit process is ongoing. Second, Defendants argue that section 304(a)(3) does not provide jurisdiction over complaints that a permit application is allegedly defective. Defendants argue that section 304(a)(3) only authorizes suit for a failure to obtain a permit at all. *See Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863, 867-68 (E.D. Pa. 1996) ("[A] substantive challenge to the conditions of the permit would lie in state court, challenges based on the state's failure to require a permit at all are proper in federal court."). Defendants assert that these circumstances are not met here because Oak Grove has applied for a permit, the TCEQ has determined that a permit is required, and the TCEQ is determining whether the permit should issue and any terms and conditions that may be necessary. Defendants assert that the review of any permit granted and its terms and conditions would occur in state court.

Plaintiffs argue that a permit based on a defective application is not a permit in compliance with section 304(a)(3). Plaintiffs assert that a permit: (1) must be based on supporting materials submitted by the applicant and its agents; (2) must arise from a proper BACT analysis; and (3) must set forth the parameters

that will apply to the construction and operation of the proposed facility. 42 U.S.C. § 7475(a). Plaintiffs assert that an entity that proposes to construct a facility based on a defective application is proposing to construct a facility "without a permit required under part C." Plaintiffs allege that Defendants did not, among other things, satisfy Part C permit requirements, which include:

> (1) analysis as to the proposed permit be conducted in accordance with applicable standards;
>
> (2) demonstrate that emissions from construction or operation of the Oak Grove Plant will not cause, or contribute to, air pollution in excess of the relevant standards;
>
> (3) proposed facility be subject to BACT for each pollutant subject to regulation under this chapter emitted from or which results from, such facility;
>
> (4) analysis of any air quality impacts projected for the area as a result of growth associated with such facility; and
>
> (5) owner/operator agree to conduct the required monitoring.

42 U.S.C. § 7475(a)(2)-(4), (6)-(7). Plaintiffs argue that a permit issued on the basis of a defective application also

violates Part C. Thus, Plaintiffs assert that construction of a facility pursuant to the non-compliant permit would then violate Part C because the construction would occur without a permit that satisfies the Part C requirements. Plaintiffs argue that because of the cascading effect of a permit application violation, the CAA allows a citizen to sue before a facility is constructed based on a proposal to construct that does not comply with the PSD requirements for a permit application. Plaintiffs assert that under Defendants' interpretation of section 304(a)(3), there would never be a section 304(a)(3) violation unless it could be brought pre-permit. Lastly, Plaintiffs argue that the Court should follow the U.S. Supreme Court in *ADEC* where it allowed the EPA to seek judicial review of the reasonableness of a state permitting agency's BACT determination in issuing a PSD permit. *See ADEC*, 540 U.S. at 484-93.

Defendants reply that Plaintiffs reading of section 304(a)(3) is an attempt to rewrite the phrase "without a permit required under [PSD or nonattainment NSR]" to "without a permit that complies with [PSD or nonattainment NSR] . . . ." Defendants argue that this is not what the statute says and is not what Congress intended the statute to say. Defendants argue that determining the adequacy of information and analyses included in a permit application and setting the terms and conditions of a permit are clearly not the types of actions that could give rise to "clear cut" violations Congress intended such as not obtaining "a permit at all."

Appendix B

The Court finds that it lacks jurisdiction under section 304(a)(3). Section 304(a)(3) allows a citizen suit against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C. 42 U.S.C. § 7604(a)(3). Based on the plain language of the statute, the Court finds that Congress intended the violation in this provision to be proposing to construct or constructing a facility without a permit *at all* (or violating an existing permit). *See Ogden Projects*, 911 F. Supp. at 867-68. Congress did not intend a federal CAA violation for proceeding through the permitting process, which would include determining the adequacy of information and analyses proposed in the permit application and setting the terms and conditions of the permit. The determination of whether an entity is a polluter for purposes of section 304 is to be made against the objective standards in the administrative proceedings, not in federal court. *See Citizens Ass'n*, 535 F.2d at 1322. Congress did intend this provision to allow a federal court in a citizen suit to force a party to get a permit if it is going to build a major emitting air facility (or to enforce the terms of an existing permit). Here, Oak Grove applied for a permit, TCEQ determined that a permit is required, and the TCEQ is now determining whether the permit should issue and any terms and conditions that may be necessary. Any review of the permit and its terms and conditions would only be proper in state court in Travis County.

Lastly, the Court distinguishes the *ADEC* case. Section 113(a)(5) of the CAA authorizes EPA to bring

an enforcement action to prohibit construction if it "finds that a State is not acting in compliance with *any requirement* or prohibition of the chapter relating to the construction of new sources" (including the PSD provisions). 42 U.S.C. § 7413(a)(5); *see also id.* § 7477 (authorizing EPA to enforce if construction does not conform to the "requirements" of PSD). In *ADEC*, the U.S. Supreme Court relied on the "any requirement" language in sections 113(a)(5) and 167 to find that EPA had the authority to enforce all of the individual requirements of PSD. *See ADEC*, 540 U.S. at 484-85. Thus, Congress gave the EPA broad jurisdiction to enforce all requirements of PSD, including the requirement to obtain a permit before construction. In contrast, under the citizen suit provisions, Congress gave limited jurisdiction to the violation of the requirement to obtain a permit before commencing construction (or for violating an existing permit). *See* 42 U.S.C. § 7604(a)(3). Here, Plaintiffs are not the EPA, they cannot step into the shoes of the EPA, and the EPA has not joined their suit; thus, the *ADEC* case is distinguishable.

D. Case or Controversy

Defendants also argue that there is no case or controversy because Plaintiffs are seeking an advisory opinion. They assert that any relief granted by this Court would not be conclusive as to the issues raised because Plaintiffs attack a mere permit application, and it is the TCEQ that is responsible for reviewing the application, determining its sufficiency, and issuing a

permit with the terms and conditions it deems are appropriate. *See* 30 Tex. Admin. Code Ann. §§ 116.111(a)(2)(C); 116.114(a); 116.160(c); 116.160(d). Defendants argue that even if the Court had the jurisdiction to review the sufficiency of the permit application and tell the TCEQ whether it is sufficient, the TCEQ is not before this Court; thus, any decision by the Court would be advisory.

Further, Defendants argue that Plaintiffs lack standing. Plaintiffs state that their alleged injury is they have "interests" in, among other things, breathing air, enjoying outdoor recreation, scenery, and property, and that the alleged deficiencies in the permit application diminish these interests. Defendants assert that there is no causal connection between the alleged injury and the challenged conduct (*i.e.*, information contained in a permit application), and their alleged injury is not fairly traceable to Oak Grove's conduct but to independent action of the TCEQ, which is not before the Court. Additionally, Defendants assert a claim is not redressable if parties needing to be bound in order for the relief to be effective are not before the Court or if the requested relief is beyond the authority of the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Baca v. King*, 92 F.3d 1031, 1037 (10th Cir. 1996). Defendants argue that the TCEQ is not before the Court, and terms and conditions of a permit are matters within the TCEQ's discretion but there is no assurance that TCEQ ultimately would issue the permit in a way that addresses Plaintiffs' complaints.

Appendix B

Plaintiffs assert that their federal CAA claims embody a "case or controversy." Plaintiffs assert that regardless of what the TCEQ decides, Defendants have violated the law independently. Further, Plaintiffs argue that because TCEQ might later take action regarding Defendants' application does not make Plaintiffs' claims moot or unripe. Plaintiffs assert that there is no difficulty in fashioning a remedy because they simply seek an injunction prohibiting Defendants from violating emissions standards and limitations and from constructing a facility without a permit required by Part C.

In addition, Plaintiffs assert that they do have standing because they allege intermediate violations that are properly the subject of a citizen suit. These intermediate violations concern the proposed Oak Grove Plant, which affects the areas in which Plaintiffs live, work, and recreate. Thus, Plaintiffs argue they have a concrete interest in requiring Defendants to comply with the requirements of the federal CAA, and any injury to Plaintiffs is traceable back to Defendants' violations of the law. Plaintiffs argue that the CAA requirements are not intended only to control ultimate emissions, but also to assure that any decision to permit increased air pollution is made only after careful intermediate evaluation of the possible consequences. 42 U.S.C. § 7470(5). Plaintiffs assert that Defendants, not the TCEQ, are responsible for the Oak Grove Plant's construction; thus, if the Court enjoins Defendants from construction in violation of the law, the injury will be redressed. They assert that joinder of TCEQ is unnecessary to achieve that goal.

The Court finds there is no case or controversy. Plaintiffs are seeking an advisory opinion because this Court is not the responsible authority for reviewing permit applications, determining their sufficiency, and issuing permits with the terms and conditions that are appropriate under the law. The TCEQ has this authority, and the TCEQ is not before this Court. Further, Plaintiffs lack standing because there is no causal connection between their alleged injuries and the permit application. The Court has already held that alleged "intermediate" violations in a permit application do not support a federal CAA citizen suit, which supports Plaintiffs' lack of standing. The TCEQ has the authority to address Plaintiffs' concerns, not this Court.

E. *Burford* Abstention

Alternatively, Defendants argue that if the Court has jurisdiction, it should abstain from exercising jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* abstention is appropriate where "timely and adequate state court review is available and where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314 (5th Cir. 1993) (internal quotations and citations omitted). Several factors are relevant in making this determination: (1) whether the cause of action arises under federal or state law; (2) whether the case requires inquiry into unsettled issues of state law; (3) the importance of the

state interest involved; (4) the state's need for a coherent policy in that area; and (5) the presence of a special state forum for judicial review. *Id.*

Defendants argue that all of the factors weigh in favor of *Burford* abstention. First, Defendants assert that Plaintiffs' cause of action, while asserted as a citizen suit under the federal CAA, involves alleged violations of state law and an attack on the state permitting process. Defendants argue that regulation and control of air pollution is recognized as an important state function. 42 U.S.C. § 7401(a)(3). Second, the state needs a coherent policy on the issues raised by Plaintiffs' claims because resolution of these issues may affect other pending or proposed applications for permits for coal-fired power plants, as well as air permitting in Texas in general. Lastly, the TCEQ already has primary jurisdiction for reviewing permit applications and making the very technical determinations the Plaintiffs are asking this Court to make. *See* 42 U.S.C. § 7479(3) (BACT determination is made by the "permitting authority"); 30 Tex. Admin. Code Ann. §§ 116.111(a)(2)(C); 116.114(a); 116.160(c); 116.160(d). Further, a contested case hearing before the specialized SOAH was held in which many of the very issues before the Court were heard. Defendants state that when the permit is issued, Plaintiffs may sue the TCEQ in state court in Travis County over that decision. Tex. Gov't Code Ann. §§ 2001.171 *et seq.*

Plaintiffs argue that *Burford* abstention does not apply. Plaintiffs assert that their claims arise squarely

under federal law, and any state laws and regulations at issue were enacted pursuant to authority delegated from the federal government. Plaintiffs also assert that this case does not involve inquiry into unsettled state law or local facts—the main dispute in this case is whether Defendants violated the federal CAA by not providing certain information and conducting certain analyses in applying for permits and proposing to construct the Oak Grove Plant. Plaintiffs further assert that clean air is not a matter of mere local concern, and any interest in cohesive local policy is equally served by the federal court's exercise of jurisdiction. Lastly, Plaintiffs argue that there is no special state forum for judicial review of federal CAA claims. *See* 42 U.S.C. § 7604(a).

Alternatively, if this Court did have jurisdiction, it would exercise *Burford* abstention. While Plaintiffs style their case as a federal CAA cause of action, the Court finds that it attacks Defendants' permit "application" and is essentially a collateral attack on the Texas permitting process. The TCEQ has jurisdiction to review permit applications, not this Court, and if a permit issues, Plaintiffs would file suit against the TCEQ in state court.

Appendix B

IV. CONCLUSION

Having heard the arguments of the parties and reviewed the Motion, Response, Reply, pleadings, and applicable legal authority, the Court finds that it lacks subject matter jurisdiction over Plaintiff's citizen suit under sections 304(a)(1) and 304(a)(3). Further, the Court finds that there is no case or controversy. Alternatively, the Court finds that if it did have jurisdiction, it would exercise *Burford* abstention. Defendant's Motion To Dismiss will be granted.

In light of the foregoing, it is

ORDERED that Defendants Oak Grove Management Company LLC, TXU Power, a D/B/A of TXU Generation Company LP, And TXU Corp.'s Motion To Dismiss is **GRANTED**. It is further

ORDERED that any and all motions or requests not previously ruled upon by this Court are **DENIED** as moot.

SIGNED on this 21st day of May, 2007.

s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
CHIEF UNITED STATES DISTRICT JUDGE